United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-7386

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FOR THE SECOND CIRCUIT

Docket Nos. 76-7386, 76-7393, 76-7417 and 76-7446

B P/S

VANA TRADING CO., INC.,
Plaintiff-Cross-Appellant-Appellee,
—against—
S.S. "METTE SKOU", her engines, boilers, etc., and
FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Defendant-Third-Party
Plaintiff-Appellant-Appellee,
—against—
OVE SKOU and INTERNATIONAL TERMINAL
OPERATING CO., INC.,
Third-Party Defendants-
Cross-Appellants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE OVE SKOU

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Facts

The Lower Court correctly exonerated Ove Skou and awarded it attorneys' fees because Ove Skou's only connection with the above-entitled action for cargo damage was its ownership of the vessel, SS METTE SKOU, aboard which the cargo in question was carried. The ownership of the vessel was not related to the cargo damage alleged. Ove Skou provided a seaworthy vessel, and in fact, a better vessel than it had agreed, in the Charter Party, to furnish.

If any employees of Ove Skou participated in the loading, stowing and/or discharging of the yams, which plaintiff claims sustained damage, the employees participated solely as the borrowed servants or, agents, of the Charterer, Flota Mercante Grancolombiana, S.A. (Flota). Their acts cannot be attributed to Ove Skou.

The document which describes the nature of Ove Skou's participation in this matter is, of course, the charterparty. (451a)* The charterparty was executed on a New York Produce Time Charter Government form, with some changes. It was dated at Copenhagen on April 26, 1974, and was entered into by Ove Skou, as agent to the Owner of the Danish motorship METTE SKOU, and Flota Mercante Grancolombiana, S.A., as the Charterer. It, in effect, turned over the command of all cargo operations to Flota. It specifically permitted Flota to hire a supercargo to supervise its cargo operations. Of course, if Flota did not wish to hire a supercargo, it could use the vessel's officers, as its borrowed servants, or agents, for this purpose.

A review of some of the provisions of the charterparty (451a) will disclose the extent to which Flota commanded

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* Numbers in parenthesis refer to pages of the appendix.

the vessel. Under the charterparty, Flota provided necessary dunnage, shifting boards and any fittings required for a special trade or unusual cargo. Flota decided the ports, at which cargo would be loaded and discharged. The whole reach of the vessel's holds, decks and usual places of loading were at Flota's disposal.

The charter contained the usual New York Produce Exchange Clause 8, with one modification, irrelevant to our situation. Clause 8 made the Captain, and, of course, the rest of the ship's crew, the borrowed servants of the Charterer for the purpose of loading, stowing and discharging cargo:

> . . . The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers if required by Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo presented, in conformity with Mate's or Tally Clerk's receipts. (425a)

Flota had the right to complain about the conduct of the Captain, officers or engineers, causing the Owners to investigate and, if necessary, change the appointment of the Captain, Officers or Engineers.

Flota could appoint a "supercargo" to accompany the vessel or attend at different ports to direct cargo operations.

Flota was to furnish the Captain with all requisite instructions and sailing directions and could demand a daily copy of the log from the Captain. The official ship's log was to be patent to Flota or its agents.

Flota could require the vessel to work day, night and weekends.

Essentially, Flota had command of the vessel for each and every evolution which related to cargo in any manner. As between Ove Skou and Flota, Ove Skou retained no cargo authority or responsibility.

Please compare the above description of Flota's authority and responsibility as outlined in the charterparty (451a) with Judge Tenney's description of an almost identical charterparty in *International Produce Inc.* v. *Frances Solman, et al.*, 1975 A.M.C. 1521, 1523-24 (S.D.N.Y. 1975) (not officially reported).

Mr. Arne Henrick Kristianson, the executive vice president of Flota's General Agent in New York, confirmed that Flota did, for all practical purposes exercise command of the SS METTE SKOU for all cargo evolutions:

> Q. Mr. Kristiansson, you testified that you decided where to discharge the Mette Skou, isn't that correct, ... ning Grancolombiana decided where it would berth ... New York City? A. Yes.
>
> Q. Did Grancolombiana also decide what ports the Mette Skou would call at? A. Yes.
>
> Q. Did Grancolombiana also book the cargo for the Mette Skou? A. Yes.
>
> If you are referring to Grancolombiana, it is either—I assume you refer to Grancolombiana Flota Mercante—
>
> Q. Yes, Flota Mercante, Grancolombiana, the parent corporation. A. The cargo was booked through them probably by an agent or by a cargo broker in Colombia.
>
> Q. Did Flota have the authority to appoint a supercargo to supervise the operations of the cargo if it so desired? A. Aboard the ship?
>
> Q. Yes. A. I believe the charter party calls for that.

I would like to consult it before I say definitely yes or no.

Q. Did Grancolombiana furnish the ship with all its sailing directions? A. Yes.

Q. Did Grancolombiana issue the bills of lading for the cargo carried on the Mette Skou? A. Yes. (227a-228a)

During the voyage in question, Flota directed the SS METTE SKOU first to load cargo at Tumaco, Colombia, then to proceed to the second loading port of Buenaventura, and finally to the port of Cartagena, at which the yams in suit were loaded (464a-466a).

While the vessel was at the second loading port, Buenaventura, Flota's representative, Mr. Gooseman, told the vessel's Chief Officer, Captain Larsen, that tobacco would definitely be loaded aboard the vessel at the next port, Cartagena (255a). Mr. Gooseman also told Captain Larsen that there was a possibility of loading yams at Cartagena but that booking of a yam cargo was not definite at that time (255a). The booking of the yam cargo did not become a certainty until the vessel reached Cartagena (255a).

At the first loading port, Tumaco, Flota loaded timber. At the second loading port, Buenaventura, Flota loaded coffee and general cargo (464a).

When the SS METTE SKOU arrived at Cartagena, Flota had left the following spaces available for loading cargo: number one lower tween deck, number one upper tween deck and number five hatch's tween deck and deep tanks (465a). If the shipper and/or Flota desired stowage space for the yams, other than the deep tanks, Flota could have ordered general cargo, which had been stowed in number three tween deck, shifted to the deep tanks. If the yam

cargo had been definitely booked before the general cargo had been loaded into number three tween deck in the second loading port, Buenaventura; and if the shipper of the yams or if Flota had expressed a desire that the yams not be carried in the deep tanks, then the general cargo could have been loaded directly into the deep tanks. This would have reserved number three tween deck for the yams.

The Chief Officer explained the loading procedure, in response to the Court's questions, as follows:[1]

> The Court: Now, at the time that you were loading in Cartagena, was there a choice of where the yams could have been stowed?
>
> A. When we arrived Cartagena, we knew for sure that we were going to load a certain amount of tobacco bales and tobacco smells and tobacco have to be kept away from any other cargo.
>
> So, number 1 lower 'tween deck, number 1 upper 'tween deck and number 5 'tween deck was just the exact space for this tobacco. Therefore, the hatches, hatchways to number 5 lower hold and to number 1 lower hold was buttoned down and three tarpaulins was put over and everything was made airtight so no smell could come down there.
>
> The Court: Where else could you have stowed these yams, considering the cargo that you were already carrying?
>
> The Witness: If we have known in good time that we are going to carry 6,500 cartons of yams to New

[1] It should be noted that the Trial Court, after observing the demeanor of the Chief Officer and witnesses on behalf of plaintiff, believed the Chief Officer and did not believe the plaintiff's witnesses with regard to a factual dispute. The Chief Officer testified that plywood, which would have prevented ventilation in the deep tanks, was not placed into the deep tanks. Plaintiff's witnesses alleged that it was. The Court held that plywood was not used in the deep tanks (13a).

York, then we could have taken the general cargo for St. John, New Brunswick, into the deep tanks. This cargo was stowed, as far as I remember, on number 3 'tween deck after part—

The Court: What was it? Coffee?

The Witness: No, it was textile. And we could have taken, filled the deep tanks up with New York coffee from number 3 'tween deck and number 2 'tween deck. Then we would have had enough space to carry the yams on the 'tween deck but during our stay in Buenaventura nobody told us for sure that we are going to have these yams, so therefore we loaded the ship as we did.

The Court: Well, would it have been possible even if time-consuming to have shifted the cargo from where it existed to the deep tanks and use the other spaces for the yams?

The Witness: It would have been possible.

The Court: Was that possibility discussed with the charterer's agent?

The Witness: That I don't know because this, these discussions were made between the shipper's representative, Grancolombiana representative, and the captain. (269a-270a).

Flota apparently did not wish to incur the expense of shifting cargo at Cartagena and the yam shipper did not think such a shift was necessary. According to the terms of the charter party, Flota would have had to pay for the shift. Therefore, the yams were loaded into the deep tanks.

Perhaps the shift was not ordered because the yam shipper had inspected the deep tanks and found them suitable to carry yams. The vessel's Chief Officer, during his deposition *de bene esse,* described the shipper's representative's involvement with the loading as follows:

A. I took that representative with me to the tween deck and showed him the deep tanks, and I showed him where the ventilation was, where the input and where the output was. And I showed him the push buttons and I pressed them in the deck house, the forward deck house, and he saw that the light was on and I took him to the ventilation itself and the fan was on and the air came in and he assured himself that the air came out.

* * * * *

Q. Did you receive any objection with regards to the stowage of the yams in the deep tanks during the stowage? A. No.

Q. And after the stowage? A. No.

Q. Did anyone from either the shipper or the charterer inspect the stowage of the yams during or after the stowage? A. The shipper's representative was on the tween deck at all time. (471a, 474a-475a).

The Chief Officer also testified at trial and confirmed that the shipper's representative and the charterer's representative participated in, if not made, the decision to load the yams in the deep tanks.

Q. How many shipper's representatives did you claim to have seen in Cartagena? A. I don't recall his name, but it was a big fellow.

Q. In other words, one person? A. One person.

Q. How many shipments were, again? A. You said what?

Q. How many shipments were there of yams? A. As far as you say, three or four.

Q. Well, I say three.

You don't know whether he was there just to pick up bills of lading and things like that? A. *He was not. Otherwise he won't have been standing there on top of the coffee overlooking the whole entire loading.*

Q. But it was the master in consultation with the charterer who decided where to stow these yams?

A. These three persons, shipper, charterer, captain, in a united—they make the decision together.

Q. And the captain told you where to stow them?
A. And the captain told me how to stow it. (287a) (emphasis supplied).

Although the Chief Mate was questioned extensively concerning the involvement of the shipper's representative, the Charterer's representative, the Chief Mate and the Captain in the actual decision to load yams in the deep tanks, the issue of who made the decision is irrelevant to the dispute between the Owner, Ove Skou, and the Charterer, Flota.

It is, however, relevant to the dispute between defendants and plaintiff, because the shipper's inspection and approval of the deep tanks show that the deep tanks did not harm the yams. Because the shipper was an expert in the care of yams and approved the deep tanks for the transportation of the yams, it may be inferred that the deep tanks were, in fact, sufficient for the carriage of yams. Something other than the stowage in the deep tanks must have caused the damage alleged. The yams could only have been harmed by their poor condition before loading, as they had been left in the ground too long after they matured; or by their method of packaging before shipment, which prohibited sufficient ventilation.

The only evidence concerning the decision to load yams in the deep tanks, which was relevant to the dispute between Owner and Charterer, *conclusively proved that the decision was made for the purpose of cargo, not seaworthiness of the vessel.* Thus, no matter who made the decision, it was made on behalf of Flota, the Charterer, and not Ove Skou, the Owner. The Chief Officer explained that the yams were not

placed into the deep tanks for the purpose of the vessel's seaworthiness.

> Q. Did the question of the vessel's stability come into consideration when you were loading the yams in the deep tanks? A. The stability of the ship lays the problems—the problems about that lays always very hard upon the chief mate's shoulders, but in this—at this time an extra load of yams either in the 'tween deck or in the lower hold would not affect the stability of the ship.
>
> The Court: In other words, the stability of the ship was not involved in this loading operation, is that it?
>
> The Witness: That's correct. (291a-292a)

Because any participation of the vessel's officers in the loading and stowage of the yams was for the purpose of cargo, not the seaworthiness of the vessel, the officers acted as the borrowed servants of Flota, not Ove Skou, while they so participated, *Nichimen* v. *M. S. Farland,* 462 F.2d 319 (2d Cir. 1972).

However, the stowage of the yams into the deep tanks was not improper.

The identification of the spaces used to carry the yams by the name "deep tanks," rather than a more suitable name, such as "dry or liquid cargo stowage spaces" probably had more to do with the initiation of this action, than any other factor. When one hears the words "deep tank" one thinks of a deep, dark, dank, circular, unventilated space.

The spaces into which the yams were stowed on board the METTE SKOU did not meet such a definition. They were large, bright, rectangular shaped, well ventilated spaces, well suited for the carriage of yams.

One of the two, identical deep tanks is shown in the illustration drawn by the vessel's Chief Officer, Ove Skou Exhibit K, (450a). A side view of the deep tanks is also shown in the vessel's plans (336a). The dark lines indicate ventilation ducts.

At the trial, the Chief Officer referred to the vessel's ventilation plan, plaintiff's exhibit 11 (366a) and described the ventilation as follows:

> Q. Could you point out the ventilation ducts that bring the air into the deep tanks? A. As I have said before, the intake comes in front of the superstructure and it is let down to the deep tanks through a big trunk approximately 1 foot by 2 feet 8 inches, and it is let down to the bottom of the deep tanks at the center, one trunk per tank, one ventilator per tank.
>
> Q. Now, where does the air go out of the deep tank? A. The air goes out at the top of the tank. In the corner, the aft corner of both tanks, at the ship's sides, there is a trunk loading[2] up through the 'tween deck and up to the main deck under cover, and there the air comes out.
>
> Q. Where are the motors that run the fans? A. These motors, electrical motors, they are situated in two steel houses on the weather deck in front of the superstructure.
>
> Q. Now, that is the forward vertical line which is colored in red on this plan which you just pointed out, Captain. (252a)

He also referred to the sketch of the tanks, which he had drawn, Ove Skou Exhibit K (450a) and described the tanks and their ventilation system as follows:

> Q. Captain Larsen, I show you Ove Skou Exhibit K and ask you to tell me what it is. A. Your Honor, during my deposition I made a sketch of the deep tanks

[2] Should read leading.

and this shows in three-dimensional way—I am not Picasso—but this one, this one—height, height.

The Court: The height.

The Witness: This refers to this one.

The Court: The height of the intake—I suppose that is the intake you are pointing to.

The Witness: Yes. That is the intake. It is coming out about 3, 2, 4 feet, I do not remember the exact height over the floor, but it comes out over the floor. There is a grille underneath here and the air is pressed down here, and as far as I remember this air will be shifted between *twenty and thirty times an hour*. The air comes down here and goes out up here. (256a-257a) (emphasis supplied).

The Chief Officer also testified that the ventilation system was run continuously throughout the voyage:

Q. How were the ventilators operated during the entire voyage? A. For the deep tanks the ventilation was on all the time.

Q. That's 24 hours? A. 24 hours a day.

Q. That's forced ventilation that was on? A. Forced ventilation.

* * * * *

Q. Now, Captain, if the ventilation machinery broke down during the voyage, would you log that? A. Certainly. If you see in this log book, we have a lot of failure—winch failures—that is recorded, and failure in ventilations will be logged as well.

Q. Were any logged? A. No failure was logged.

The Court: There was no ventilation failure during the voyage?

The Witness: Not at all. (489a) (261a)

Perhaps the plaintiff, sitting in New York City, did not think the deep tank was ventilated, because Ove Skou did

not promise ventilated deep tanks in the Charter Party, Flota exhibit L, (451a, 455a).

Clause 30 provides:

> "The 'METTE SKOU' is built 1963 and is an open shelter-decker equipped with . . . *two (2) coiled deeptanks* with a total capacity of about 31.595 cubic feet bale, has two (2) wingtanks with a total capacity of about 7875 cubic feet grain, five (5) hatches, *electrical ventilation in all holds,* and has CO_2 lines in all holds to enable carry cotton . . ." (emphasis supplied)

Clause 39 provides:

> "The deeptanks are to be used for dry-cargo only. The wingtanks are normally used for bunkers or ballast water only but to be at Charterers' disposal for cargo purposes but cleaning to be for Charterers' account and on their time."

Clause 30 only agreed to provide mechanical ventilation ***in the holds, not in the deep tanks.***

Clause 39 limited the use of the deep tanks to dry cargo because the deep tanks' heating coils were out of operation. Therefore, the cargo of yams could not have been mistakenly heated during the voyage (282a).

However, the shipper, sitting in the loading port of Cartagena, realized that Ove Skou furnished more than it had agreed to furnish. The deep tanks were well ventilated and the shipper's representative allowed yams to be loaded into them (471a, 474a).

Plaintiff tried many theories to shift the blame from its overripe and insufficiently packaged yams to the vessel. Plaintiff claimed that plywood had been laid between the tiers of yams to block the ventilation. Plaintiff's expert, Mr.

McCabe, claimed that he saw plywood blocking the ventilation in the deeptanks, (180a), yet plywood was not used in the deeptanks. It is doubtful that Mr. McCabe was even on the ship. Chief Officer Larsen testified that surveyors customarily report to him before inspecting cargo on ships, yet Mr. McCabe neither requested such permission, nor was seen on the ship by the Chief Officer:

> Q. Now, Captain, as a general custom, when a surveyor comes aboard a ship, does he report to yourself as the chief mate? A. Your Honor, in Danish vessels it is the chief mate who acts according to captain's order and the chief mate, he have full discretion with cargo and the stowage of cargo and everything, and it is customary—I would like to see that surveyor who goes down into my cargo holds without telling me that he is a surveyor and he wants to see this and that cargo.
>
> Q. So, Captain, the surveyors usually ask you whether they can go down into a cargo compartment before they do so? A. They do.
>
> Q. Did any surveyor ask you whether he could go down to the cargo compartment or did any surveyor report to you when your vessel was in the port of New York discharging these yams? A. When we arrived New York the 1st of July, the usual Grancolombiana surveyor came on board and asked me to follow him around in the ship and we went through the ship, but the only place he did not went to was the deep tank; and I would like to see a man of that age creeping up and down that deep tank.
>
> Q. Did anyone else, any other surveyor, report to you aboard the Mette Skou in New York at this time? A. No. The Grancolombiana surveyor was the only one who came to me and he was the only one I followed around in the cargo holds.
>
> Q. I just have one other thing, Captain—

The Court: Well, you saw this man who was in court here—what was his name?— Mr. McCabe, Austin McCabe. He was testifying in court here. Did you see him in court?

The Witness: I saw him in this court.

The Court: Did you see him on your ship on July 1st or 2nd or 3rd?

The Witness: I have not seen that man before.

The Court: Did he make an inspection of the deep tanks so far as you are aware?

The Witness: No.

The Court: Did anybody ask permission for him to make an inspection of the deep tank or the cargo of yams so far as you know?

The Witness: No.

The Court: To the best of your knowledge, would anybody have been allowed to make an inspection of the deep tanks and the cargo of yams without reporting to you?

The Witness: No.

Q. Captain, just one more question—

The Court: Do you know the name of the man from Flota Grancolombiana that came on board?

The Witness: Normally there were two men who did the survey, one one day, and another one the next day, and so on.

The Court: Do you know who they were?

The Witness: I know who they were, but I can't remember their names.

The Court: One of them was not Mr. McCabe?

The Witness: No. (263a-265a)

Mr. McCabe conceded that he usually takes notes and issues a report after he conducts a survey on a ship, (198a-199a). Yet, he could produce neither notes, nor a report to show that he had been on board the METTE SKOU, (189a-190a).

Mr. McCabe also claimed that there was little, or no ventilation in the deep tanks. He conceded, in answer to the Court's question, that he had not tested the ventilation in the deep tanks. He simply presumed that the ventilation was insufficient because the yams' temperatures were too high (200a-201a).

Judge Pollack disregarded Mr. McCabe's description of the plywood dunnage and the ventilation by finding that no plywood was placed into the deep tanks, and that ventilation did exist in the deep tanks. (15a) This Court should similarly disregard any testimony by Mr. McCabe.

The more logical and plausible reason for the yams' high temperatures was explained by another expert called by plaintiff, Captain George N. Axiotes, and two experts called on behalf of Ove Skou, Captain Kjell Hansen and Doctor William P. Ferren. These three experts agreed that the newsprint, which wrapped the yams, acted as an insulator and contained the natural heat produced by the yams. Plaintiff's expert explained the effect of wrapping the yams in newsprint as follows:

> The Witness: It probably would cook it in its own juice, so to speak, your Honor. That is the only way I can describe it. (218a)

Captain Hansen commented, as follows, on the cartons into which the yams were packed, Ove Skou Exhibit V, (556a):

> A. I notice that this particular box does not have the ventilation holes in the side. I would think that a box like that would not permit air to flow through, obviously would not permit air to flow through the carton.
>
> The Court: Are you saying that the carton would be a contributing cause to heat damage?
>
> The Witness: Yes, sir. (303a)

Dr. Ferren explained that both the newsprint which wrapped each yam and the box with minimal ventilation, would act as an insulator to hold the heat, naturally produced, against the yam. This would increase the yams' rate of respiration, which would simply cause more heat, (315a, 316a, 321a). Dr. Ferrin thought that some gases could permeate the newsprint and the box.

Dr. Ferrin, a professor of chemistry at Wagner College, having earned the Ph.D. degree in food science and agricultural biochemistry; and having worked under Dr. Gooding, one of the inventors of antimold, an antifungal agent; was the only witness qualified and able to detect the significance of the fusarium rot and sprouts noted by the U.S. Department of Agriculture on the yams at discharge from the vessel, Plaintiff's Exhibit 6, (353a). Dr. Ferrin explained that both fusarium and sprouts require oxygen. Therefore, oxygen was able to permeate even the yams' newsprint wrappings and cartons. This oxygen could *not* have reached the yams without ventilation. (317a-318a)

> Q. And if no outside air was blowing into this space during the voyage, what would happen in that space? A. Well, in the constant competition for living forms, if the aerobes [fusarium and sprouts] don't have oxygen, the anaerobes take over.
>
> Q. And how would that have been manifested? A. Anaerobic metabolic reactions are characterized by extremely foul putrification odors and it is very unpleasant.
>
> Q. And this would have been readily noticed when the space was opened at the end of the voyage? A. I believe so. (318a-319a)

The damage in question, if it occurred at all, was caused not by stowage or lack of ventilation aboard the ship. It was caused by the insufficient packaging which held the heat produced by the yams next to the yams, and caused them to cook in their own juices.

POINT I

The lower court correctly held that Ove Skou, the vessel owner, has no responsibility for the damage alleged. Even if any damage occurred, it was not caused by any unseaworthy condition of the METTE SKOU. Flota, the Charterer, not Ove Skou, would bear the responsibility for damages caused by improper stowage and/or handling.

The New York Produce Exchange Form of Time Charter Party governs all the rights and duties between Owner and Charterer. The Time Charter Party in question was dated in Copenhagen on April 26, 1974. It was entered into by Ove Skou, as agent to owners of the Danish Motorship Mette Skou, and Flota Mercante Grancolombiana S.A., as the Charterer.

The Charter Party placed all authority and responsibility for cargo operations on the Charterer. The Charterer decided to book the cargo of yams and decided to load the cargo of yams in the vessel's deep tanks. If the vessel's deep tanks could not be ventilated as well as other spaces in the ship, and if the yams required more ventilation than the deep tanks could provide, the charterer should have stowed them in the other spaces. If the vessel's Officers participated in loading the cargo, they acted as agents for Charterer, Flota, not Owner, Ove Skou, *Nichimen Company* v. *M. V. Farland*, 462 F. 2d 319 (2d Cir. 1972). The owner did not warrant that the deep tanks could be ventilated.

As outlined at pages 3-5, *infra*, the Charter Party indicates that cargo was entirely Charterer's, Flota's operation.

The Charter Party contained the usual Clause 8 which makes the Captain the borrowed servant of the charterer for the purposes of loading, stowing and discharging the cargo. This clause contained only one minor change from the form. This change is not relevant to our situation. The clause reads as follows:

> 8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with the ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain who if required by the Charterers is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

The Charterer issued and signed Bills of Lading for the 5,000 cartons of yams and decided to load the yams in the vessel's deep tanks. The deep tanks provided the only available space when the vessel arrived in Cartagena. There was some discussion that the yams could be stowed in the #3 'tween deck if coffee was shifted into the deep tanks. However, this shift would have caused the Charterer extra expenses. It would also have delayed the vessel and thus increased the charterer hire Charterer would have had to pay the Owner.

The placement of yams on top of the coffee would also have created problems for the Charterer when the vessel reached the first discharge port. The coffee had to be discharged first. Therefore, the Charterer would have had to shift the yams to allow the coffee's discharge. Obviously, the stowage of the yams in the deep tanks was for the economic benefit of the Charterer.

The duties and responsibilities between owners and charterers for the loading and stowing of cargo have been fully explained by Judge Friendly in *Nichimen Company v. M. V. Farland,* 462 F.2d 319, (2nd Cir., 1972). Basically, Judge Friendly held that vessel's officers act as agents for both the vessel's owner and her charterer according to the purpose for which they act. When they act for the purpose of cargo, they act as the charterer's agents. When they act for the purpose of the seaworthiness of the vessel, they act as the owner's agents.

If the Officers of the Mette Skou had decided to shift the yams in question from one space to another *to correct the trim or the stability of the vessel,* they would have been acting as agents of the vessel's Owner. The stability of the vessel did *not* enter into the decision to stow the yams in the deep tanks. (291a-292a)

Nichimen Company v. *M. V. Farland,* 462 F. 2d 319 (2d Cir., 1972) involved the same charterparty with the same relevant portion of Clause 8 which is now before the Court.

There, coils of steel, weighing 9 tons each, broke from their stow and sustained considerable damage. The Charterer pointed out that the vessel's Master and Mates had supervised the stowage. Charterer argued that the Master participated in the stowage operations to such an extent, or degree, that the Owner was liable, relying on *Horn* v. *Cia de Navegacion Fruco, S.A.,* 404 F. 2d 422 (5th Cir., 1968), *cert. denied* 394 U.S. 943, 89 S. Ct. 1272, 22 L.Ed. 2d 477 (1969). Charterer also tried to attribute the improper stowage to the Owner under the theory that the Master was concerned with the seaworthiness of his vessel, not the steel, when he supervised the stowage, because 9 ton steel

coils flying about the hold could injure his vessel. The Court did not accept Charterer's arguments.

Judge Friendly did not look to the *degree* to which the Master participated in the stowage operation as urged by Charterer. Judge Friendly realized that a degree test would not clearly define Owners' and Charterers' responsibilities. Instead, a degree test would throw a cloud over the area of Owner/Charterer responsibility and would require litigation of every separate situation, much like the package limitation disputes, which now plague the Court. The Court looked instead to the *purpose* of his participation.

> Whether in any particular case he acts on behalf of the owner or charterer must be determined by looking to the purpose for which he acts. Cf. The Santona, supra, 152 F. at 518. Thus, in light of what has already been said, we think the owner's liability for cargo damage due to improper stowage is limited to instances in which the Captain intervenes in the stowage process to protect the vessel's safety and ability to withstand the perils of the sea; to the extent that he acts merely to protect the cargo, the charterer is responsible.[15]

---

[15] This appears to be the same test as that employed by the Fifth Circuit in Horn v. Cia de Navegacion Fruco, S.A., supra, 404 F. 2d at 433, although we are not certain we would agree with its application to the facts of that case. There the shipowner was deemed to be liable for damage to a load of bananas on the grounds that the vessel was unseaworthy because it was not adequately and competently manned at the beginning of the voyage and because the bananas had not been properly stowed by the Captain and his mate to allow necessary cooling and ventilation, thus affecting the "capacity of the ship to transport the delicate cargo in the manner specified in the charter party." Insofar as the owner's liability rested on the improper method of stowage, we have some question whether, given clause 8, the owner bears responsibility for inability of the vessel to carry the cargo safely not as a result of any defect or vice in the vessel, see supra, but only as a result of the method of stowage itself.

Farland, supra, 462 F. 2d at 333.

In footnote 15 *supra,* Judge Friendly disagreed with the result reached by the Fifth Circuit when it applied the test to the *Horn* facts. He did not agree that improper stowage, even if it rendered the vessel unseaworthy to carry the cargo, should be Owner's fault. Owner should only be responsible for an unseaworthy condition in the vessel itself, not an unseaworthy condition created by improper stowage.

The Second Circuit's disagreement with the Fifth Circuit has recently been emphasized by Judge Tenney:

> This Court disagrees with the holding in Horn v. Cia de Navegacion Fruco, S.A., 1968 AMC 2548, and 1969 AMC 1495, 404 F.2d 422, 433 (5 Cir., 1968), cert. denied, 394 U.S. 943, 1970 AMC 256 (1969), which would impose liability on the shipowner for unseaworthiness as the result of improper stowage, despite the inclusion of Clause 8 in the charter party. See Nichimen Company v. M/V Farland, supra, 1972 AMC at 1592, 462 F.2d at 333, n. 15.

International Produce, Inc. v. *Frances Salman, Etc.,* 1975 A.M.C. 1521, 1544-1545 (S.D.N.Y., 1975).

In the *Frances Salman* case, the vessel's officers did not simply watch longshoremen load and stow cargo as they did here. The Frances Salman's officers and crew physically stowed cargo improperly. The Court properly held that they so acted for the purpose of cargo and therefore as Charterer's agents.

Judge Tenney also examined the same N.Y. Produce Exchange Form of charter party now before the Court.

He set forth the rights of the Frances Salman's charterer, which are identical to Flota's rights, and concluded that the Charterer had command of the vessel for all evolutions that related to cargo in any manner, *Frances Salman, supra,* 1975 A.M.C. at 1523-1524. It is therefore logical that Charterer should bear the responsibility for any loss caused by a cargo operation:

> Under the charter party, Netumar provided necessary dunnage, shifting boards and any fittings required for a special trade or unusual cargo. Netumar decided the ports in which cargo would be loaded and discharged. The whole reach of the vessel's holds, decks and usual places of loading were at Netumar's disposal.
>
> The charter contained the usual Clause 8, which makes the captain the borrowed servant of the charterer for the purpose of loading, stowing and discharging cargo:
>
> "The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as prescribed in conformity with Mate's or Tally Clerk's receipts."
>
> Netumar had the right to complain about the conduct of the captain, officers or engineers, causing the Owners to investigate and, if necessary, change the appointment of the captain, officers or engineers.
>
> Netumar could appoint a "supercargo" to accompany the vessel or attend at different ports to direct cargo operations.
>
> Netumar was to furnish the Captain with all requisite instructions and sailing directions and could demand a daily copy of the log from the Captain. The original ship's log was to be patent to Netumar or its agents.

> Netumar could require the vessel to work day, night and week-ends.
>
> Essentially, Netumar had command of the vessel for each and every evolution which related to cargo in any manner.

Frances Salman, supra, 1975 A.M.C. at 1523-1524.

In *Nichimen & Company* v. *M. V. Farland,* 462 F. 2d at 332, Judge Friendly also disagreed with the Charterer's argument that the Master's supervision of cargo stowage could be performed as Owner's agent if the stowage was so dangerous that it threatened the safety of the ship. The Charterer there claimed that an improperly stowed 9 ton steel coil could break loose and seriously damage or hole the ship. The Second Circuit simply answered:

> To hold the shipowner primarily responsible in all such cases would effectively undermine the charterer's obligation under Clause 8.

Farland, supra, 462 F. 2d at 332.

Charterer's responsibility for stowage is by no means a v theory, but is the well established law.

In *Oxford Paper Company* v. *The Nidarholm,* 282 U.S. 681, 682, 51 S. Ct. 266, 75 L. Ed. 614 (1931), the Supreme Court held a charterer liable for improper stowage of lumber on deck when the charter party provided that "charterers-load, stow, and trim the cargo at their expense under the supervision of the Captain." While the government form time charter was involved, the language is similar to Clause 8 of the charter party now before the Court.

A/S Brovanor v. *Central Gulf Steamship Corp.,* 323 F. Supp. 1029 (S.D.N.Y., 1970) is directly in point. The Court

examined the same Clause 8 of the New York Produce Exchange Form of Charterparty and held the charterer responsible for damage due to improper stowage.

The *Luigi Serra* v. *s/s Francesco C.*, 1965 A.M.C. 2029 (S.D.N.Y., 1965) (not officially reported) affirmed 379 F. 2d 540 (2d Cir., 1967) interpreted the same issues now at bar. The s/s Francesco C. had been time chartered under the New York Produce Exchange form of charter-party. However, the s/s Francesco C.'s clause was changed to add the words "Master to be responsible for proper stowage of cargo but not for damage which might occur following careless handling and stowage by charterers stevedores."

The s/s Francesco C.'s charterers participated in the formulation of and approved a stowage plan for the cargo. The s/s Francesco C.'s first officer either failed to inspect the cargo stowage, or if he did inspect it, he failed to make necessary changes in the method of securing.

The cargo was damaged after it broke stow in weather with winds up to Force 8.

The Court held that the charterer was responsible for the stowage under Clause 8 of the New York Produce Exchange form of charter-party. The shipowner was thus entitled to indemnification from the charterer for the damages into which it had been cast.

In *Jamos Limitada* v. *S.S. Bernhard Ingelson,* 1963 A.M.C. 1162 (S.D.N.Y., 1963) (not officially reported) carbon black had been stowed on top of and around paraffin wax which contaminated the wax. In litigation between owners and time charterers, the liability for the loss was imposed on the time charterers because the time charterers undertook and directed the stowage, as in the case now at bar.

Clause 8 of the New York Produce Exchange form of charterparty was also involved in *Demsey & Associates, Inc.* v. *s/s Sea Star,* 321 F. Supp. 663 (S.D.N.Y., 1970). In the *Sea Star,* the Court found that some of the cargo was damaged as a result of an unseaworthy condition and some of the cargo was damaged as a result of improper stowage.

As to the cargo which had been improperly stowed, the Court stated, at page 671:

> With respect to the damage to the coils which were stowed in the lower holds, Atlantic [owner] is entitled to indemnity from World Bulk, [time charterer] . . . World Bulk had the duty to load and stow the coils under the time charter, and World Bulk engaged Pittston to discharge the Interstate coils in Chicago." (Citations omitted.)

In *Isbrandtsen Co.* v. *The George S. Boutwell,* 1958 A.M.C. 315, S.D.N.Y., 1957, (not officially reported), suit was again brought under the New York Produce Exchange form of time charter, the same form now before the Court. Damage to the cargo resulted from faulty stowage of the cargo in Nos. 2 and 4 tween decks. The Court held that the liability for the faulty stowage fell upon the time charterers, and that it made no difference that the officers of the vessel should have noticed the lack of proper chocking.

In *The Thomas P. Beal,* 11 F. 2d 49, (3rd Cir., 1926), the time charterers loaded oil in barrels too near the vessel's fire room, with the result that the barrels leaked and oil was lost. The liability for the cargo damage was held to rest upon the time charterers. After quoting from *The Santona,* 152 Fed. 516, 518, the Court said, page 53:

> And so the parties in this case construed the charterparty, for it is perfectly clear that the charterer, first

at one port and then at another and finally at San Francisco, booked the freight, designated the places of stowage, did the stowing itself through its own stevedores, and assumed all responsibility thereof. On the issue between the charterer and the ship we find the charterer liable."

Judge Weinfeld followed this line of reasoning in *British West Indies Produce Inc.* v. *S/S Atlantic Clipper,* 353 F. Supp. 458 (S.D.N.Y. 1973) and awarded the vessel owner complete indemnity, including reasonable attorneys fees, from a charterer for damage due to improper discharge and other improper handling of yams and other perishable cargoes imported by a company owned by the same plaintiff now before the bar.

The Owner did not warrant ventilation in the deep tanks. The provision which mention ventilation or deep tanks provide as follows:

Clause 12:

"That the Captain shall use diligence in caring for the ventilation of the cargo."

Clause 30 provides:

"The 'METTE SKOU' is built 1963 as is an open shelter-decker equipped with . . . *two (2) coiled deeptanks* with a total capacity of about 31.595 cubic feet bale, has two (2) wingtanks with a total capacity of about 7875 cubic feet grain, five (5) hatches, *electrical ventilation in all holds,* and has CO_2 lines in all holds to enable carry cotton . . ."

Clause 39 provides:

"The deeptanks are to be used for dry-cargo only. The wingtanks are normally used for bunkers or ballast

water only but to be at Charterers' disposal for cargo purposes but cleaning to be for Charterers' account and on their time." (emphasis supplied)

The Charter Party did not claim that the deeptanks were ventilated.

The Charter Party only specified that the Captain would use diligence to care for the ventilation of the cargo. It is obvious that he could only do so in the spaces equipped with ventilation. If Charterer had loaded cargo in the wing tanks it could not expect ventilation. If Charterer loaded cargo in a fore peak, it could not expect ventilation. Similarly, Charterer bought no warranty that the deeptanks were ventilated.

Clause 30 clarified that the owner only warranted mechanical ventilation in holds not in the deep tanks.

This clause described the deeptanks as "equipped with coils" and as having a certain bale capacity. This description pointedly left out ventilation. It promised ventilation in the holds of all five hatches, not in the deeptanks.

Clause 39 specified that the deeptanks could only be used for dry cargo, but made no claim that cargo requiring ventilation could be carried there.

Any liability in this case is solely Charterer's not Owner's. The Owner provided not only the ship it agreed in the charterparty to provide, it even gave the Charterer a better ship, with ventilation in the deeptanks.

POINT II

The lower court was correct in granting Ove Skou indentification for all its costs, damages and counsel fees from Charterer. Ove Skou should also receive indemnification in this Court, whether or not plaintiff prevails.

In *Nichimen & Company* v. *M. V. Farland, supra,* 462 F. 2d at 333-334, the Second Circuit treated a grant of owner's counsel fees as necessary element of its indemnity claim.

> [Charterer] argues that even if it is held bound to indemnify [owner] from liability to Nichimen, the liability should not extend to attorneys' fees. We fail to see why. If [charterer] breached its duty to [owner] under clause 8 of the charter, it is bound to make good the expectable consequences of its breach, of which the incurring of attorneys' fees in defending against a claim by Nichimen was surely one. [Charterer's] contention that the admiralty recognizes attorneys' fees as recoverable by an indemnitee only in the familiar triangle of the land-based harbor worker versus the ship versus his employer is sufficiently answered by David Crystal, Inc. v. Cunard Steamship Co., 339 F. 2d 295, 300 (2 Cir. 1964), cert. denied 380 U.S. 976, 85 S. Ct. 1339, 14 L. Ed. 2d 271 (1965). See also A/S Brovanor v. Central Gulf Steamship Corp., supra, 323 F. Supp. at 1033. In United States v. S.S. Wabash, supra, 331 F. Supp. at 148, attorneys' fees were awarded a time charterer in the situation, opposite to that here, where cargo damage had been caused by unseaworthiness for which the owner was responsible.

The Second Circuit also granted counsel fees expended on appeal, as well as those expended in the Lower Court, as elements of indemnity, *Iligan Int. Steel* v. *John*

Weyerhaeuser, 507 F.2d 68, 73, (2d Cir., 1974), *cert. denied,* 421 U.S. 965 (1975).

> We likewise adopt the portion of Judge Ward's opinion, 1974 AMC at 1737, 372 F. Supp. at 872, allowing New York Navigation to recover from the ship and its owner all the attorneys' fees which it incurred in resisting Iligan's claims . . . New York may also recover attorneys' fees for resisting Iligan's claims in this court. If the parties are unable to reach an agreement concerning the appropriate amount of those charges, they shall be fixed by the district court.

The rule that a ship owner is entitled to recover legal expenses from a charterer is as well settled, as the rule which permits indemnity from a stevedore to a ship owner for the failure of the stevedore to load and discharge cargo in a workmanlike manner, *Crosson* v. *N. V. Stoomvaart MIJ "Nederland",* 409 F. 2d 865 (2d Cir. 1969); *Paliaga* v. *Luckenbach S.S. Co.,* 301 F. 2d 403 (2d Cir. 1962) and cases cited 301 F. 2d at page 408.

In *David Crystal* v. *Cunard S.S. Co.,* 339 F. 2d 295 (2d Cir., 1964) a shipowner was allowed legal expenses in defending a suit for misdelivery of cargo when misdelivery was due to the fault of the stevedore.

This rule is not limited to cases of owner and stevedore; it was applied in the charter party case of *Holly* v. *Manfred Stansfield,* 186 F. Supp. 805 (E.D. Va., 1960). See pages 811, 812.

Similarly, Judge Frankel, awarded a charterer reasonable counsel fees for its defense of an action in which the shipowner was held liable due to the unseaworthiness of its vessel, *United States* v. *S/S Wabash,* 331 F. Supp. 145 (S.D.N.Y. 1971).

Judge Weinfeld, in *A/S Brovanor and Salamis A/S* v. *Central Gulf Steamship Corp.*, 323 F. Supp. 1029 (S.D.N.Y. 1970) awarded owners legal expenses because of charterers breach of the charter. That case is directly in point here.

If plaintiff does not prevail, the Charterer should still be required to pay Ove Skou its reasonable counsel fees.

In 1964, this Court required a stevedore to indemnify a shipowner for reasonable counsel fees expended by the shipowner *in the successful defense* of a personal injury suit. The Court explained its rationale as follows:

> The determination that the ship was neither negligent nor unseaworthy does not, however, relieve the stevedore from liability to the shipowner for breach of warranty of workmanlike service. Recovery over may be had even if the shipowner is exonerated from fault or unseaworthiness. . . . While the shipowner has been successful in defense of the main action, he has suffered loss, in the form of attorneys' fees and expenses in the defense, caused by the actions of the stevedore's employees in two respects which we hold were in breach of the stevedore's warranty of workmanlike service.
>
> *Guarracino* v. *Luckenbach Steamship Company*, 333 F. 2d 646, 648 (2d Cir. 1964); see also *Stachan Shipping Co.* v. *Kominklyke Nederlandsche—S.M., N.V.*, 324 F. 2d 746 (5th Cir. 1963).

The same rationale was also expressed by Judge Palmieri in *Gonzales* v. *Pennsylvania Railroad Company*, 183 F. Supp. 779, 781 (S.D.N.Y. 1960).

> Nor would it be reasonable to relieve [stevedore] of an obligation that would otherwise attach because [shipowner] was successful in resisting plaintiff's "claim for damages".

Similarly, the Southern District of Texas held:

> There appears to be no logical basis for distinguishing between a successful and an unsuccessful defense on the part of the shipowner, to the end that costs and attorneys' fees may be recovered as a normal element of indemnity in the latter . . .
>
> *Caswell* v. *Kominklyke Nederlandsche Stoomboat M.*, 205 F. Supp. 295 (S.D. Texas, 1962).

The Eastern District of Virginia also granted counsel fees to a shipowner after a successful defense of personal injury action:

> The subsequent loss or damage to the shipowner occurred when the action was brought and the shipowner was required to incur expenses and attorneys' fees to defend the action.
>
> *Bielawski* v. *American Export Lines*, 220 F. Supp. 265, 270 (E.D. Va. 1963).

The owner had no direct relationship with the shipper and it would not have been sued except for the manner in which the Charterer performed its services. Therefore, Ove Sk . should be fully indemnified by Flota.

POINT III

The Lower Court's finding that plaintiff has established its prima facie case was clearly erroneous and contrary to the substantial weight of the evidence.

Plaintiff must, in order to make out a *prima facie* case, prove by a prepondenance of the evidence that the yams were delivered to the SS METTE SKOU at Cartagena, Columbia, in good order and condition. *Steel Products Corp.* v. *Andras Mentor*, 1969 A.M.C. 1482 (S.D.N.Y., 1967) (not officially reported); *The Francis Salman* 1975 A.M.C. 1521, 1544-1545 (S.D.N.Y., 1975). This required proof was

never introduced. No proof of the internal condition of the yams before loading was mentioned. The plaintiff also failed to prove that the packaging of the yams was sufficient to place the yams in good order and condition for ocean transportation. In fact, Judge Pollack specifically held that the packaging was insufficient:

> The yams had been packed in cartons that may be described as non-breathing and had been wrapped in newsprint, an unsuitable wrapping for such a commodity, which produced a cooking effect. (17a)

Although the Lower Court ultimately held that the plaintiff had proved that yams, alone, were in good order and condition at loading, the finding was obviously a reluctant one in view of the qualification in the trial judge's Opinion that:

> . . . the yams were in a susceptible condition . . . (17a)

when delivered to the ocean carrier.

Because the Court found that the yam cargo, as prepared in the cartons for shipment, was specifically not in good order and condition, it should have dismissed plaintiff's Complaint.

The only proof that plaintiff offered at trial regarding the condition of the yams prior to loading was (1) the bill of lading (Vana Exhibit 5), (2) the certificate issued by the Colombian Ministry of Agriculture and, (3) the testimony of the shipper, Diaz, that he had inspected a sampling of yams at the pier a day and a half before loading (415a). None of this evidence is sufficient, as a matter of law, to establish the actual good order and condition of the cargo at loading.

The bill of lading (plaintiff's Exhibit 5, 352a) issued by Flota recites that the yams were received in "apparent good order and condition." A bill of lading, without exception noted on its face as to the condition of the cargo, is evidence of only the apparent, *external* good condition of the cargo, not the actual condition. *E. T. Barwick Mills* v. *Hellenic Lines,* 331 F. Supp. 161 (S.D. Ga., 1971), aff'd 472 F. 2d 1406 (5th Cir., 1973); *Hecht, Levis & Kahn Inc.* v. *S.S. President Buchanan,* 236 F. 2d 627 (2d Cir., 1956); *Berner Co.* v. *Bjornbo,* 1976 AMC 1219 (S.D. Ala., 1974) (not officially reported); *The Neil Maersk,* 91 F. 2d 932 (2d Cir., 1937). The bill of lading, prepared by the shipper and issued by Flota after a cursory inspection by seamen, is certainly not conclusive proof of the actual good condition of the yams. The inability of seamen to inspect yams was explained by plaintiff's own witness.

Both the shipper and the plaintiff testified that the yams in suit were perishable vegetables. They were subject to infestation by bacteria and fungus, beetles, termites and rodents during the three month period they were allowed to remain in the ground after they matured, and were waiting to be sold (401a). After they were finally dug from the ground, they remained in warehouses, at temperatures of about 95° F., for three months before they were loaded onto the ship (400a, 139a).

No pulp temperatures were taken of the yams before shipment, even though plaintiff's president testified in the following language, that internal heat damage could not be noticed by an external examination of the yams (57a).

> When yams are affected by excessive heat, it is difficult to determine how badly damaged or the extent of the damage to the yams unless you actually cut the yam. When cutting the yam then you will find the texture, the interior of the yam has discolored, which it

> will eventually in a short period of time affect the surface of the yam. But even before affecting the surface of the yam, if the yam or any other vegetable is *overheated, such as a hundred degrees,* it will take some time before the yam is affected on the surface, before it becomes visible. So it becomes most difficult to repack because the surface may be solid while the interior may already start the decaying process. (57a) (emphasis supplied)

Plaintiff admitted that the yams had been stored at 95°, only five degrees below the 100° level, for about six months before delivery to the vessel (400a, 139a).

The burden was on plaintiff to demonstrate to the Court the *actual* good order and condition of the cargo, *Clark* v. *Barnwell,* 12 How. 272; *United States* v. *Central Gulf,* 340 F. Supp. 481 (D. Ala.); *Commercial Molasses Corp.* v. *New York Tank Barge Corp.,* 314 U.S. 104 (1941); *The Neil Maersk, supra* and plaintiff failed to meet the burden. This burden is placed on plaintiff because it has "superior access to information as to the condition of the goods when delivered to the carrier". *Commodity Service Corp.* v. *Hamburg-American Line,* 354 F. 2d 234 (2d Cir., 1965).

Plaintiff cannot rely upon the certificate by the Colombian Ministry of Agriculture to prove that the yams were in good condition at loading. The certificate noted only that "to the best of the Inspector's knowledge" the vegetable was free from disease or pests. There was no evidence put forward to show that the Inspector did anything more than to sign the certificate. No existence of pulp temperatures or an internal examination before shipment was introduced.

It has been held repeatedly by the Courts, that the issuance of an export certificate, which makes a general

commentary as to the condition of a perishable cargo, is insufficient to prove actual good order and condition. *The Neil Maersk, supra; Commodity Service Corp.* v. *Hamburg-American Line, supra.*

Even the shipper's unbelievable claim, that he observed 45,000 individual yams during packing (409a), and sampled additional yams at the pier a day and a half before loading, (415a), was insufficient, if believed, to prove, as a matter of law, the *actual* good order and condition. The shipper made only a visual, or at best "hand-holding" examination of the yams (413a-414a). Although such inspection might be sufficient for a surface defect or disease, which is observable, plaintiff's own president, Mr. Sousa, explained that it is not sufficient for an internal disorder such as is alleged in this action (57a). Plaintiff, itself, admitted that it takes at least one or two weeks before an infested yam will manifest damage (57a).

In *Berner Co.* v. *Bjornbo, supra,* the Court rejected the shipper's report of the condition of Brazil nuts at the time they were delivered to the ocean carrier, because the report did not concern itself with the particular condition which sustained damage. Similarly, the shipper's testimony regarding the condition of yams before shipment should have been rejected by the Lower Court, because it did not concern itself with an *internal* examination, the only kind of examination which could notice the defect alleged.

In sum, plaintiff did not request special handling requirements for its cargo. It therefore must bear the burden to prove that the yams were delivered in their wrappings and packages in such a condition as to withstand a sea voyage

of eleven days. See *Berner Co.* v. *Bjornbo, supra* at 1222. Obviously, plaintiff failed to meet the burden.

The circumstances of this case fall squarely within the considerations of this Circuit in the case of *The Neil Maersk, supra,* 91 F. 2d at 934-935, where Judge Augustus Hand concluded in his opinion that:

> In the present case, unlike Schnell v. The Vallescura, we are not concerned with the applicability of the bill of lading exceptions relieving the carrier, for there is no proof of the condition of the fish meal when loaded. If the fish meal had an excess of moisture or oil, or was, because of other defects, in a condition unfit for shipment and the damages were thereafter increased through stowage in ill-ventilated and hot portions of the ship, the libelants would have the burden of showing what was the condition of the meal when placed on board. *Without proof of such condition, there would be no basis for calculating any damages caused by the carrier.* The condition of the goods when placed on board was not within its knowledge, and it should not have the burden of separating damages arising from causes prior to shipment from damages due to negligent stowage. We think that the rule of Schnell v. The Vallescura does not apply to such a situation. The libelants have not sustained the initial burden of proving the condition of the shipments when made so that they have not established a cause of action. (emphasis supplied)

Regardless of whether the Lower Court speculated that poor stowage may have aggravated or catalyzed the damages, plaintiff has still failed to prove that the internal condition and packaging, which caused the rot and decay at discharge, were not present at loading. The trial judge was in error in holding that plaintiff had proved the first step in establishing its *prima facie* case—*actual* good order and condition at loading.

CONCLUSION

The dismissal of Ove Skou and the award of costs and attorneys' fees to Ove Skou should be affirmed. Ove Skou should also be awarded costs and attorneys' fees expended on appeal.

The lower court's judgment in favor of plaintiff should be reversed to dismiss plaintiff's complaint.

Respectfully submitted,

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